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IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A CORPORATION,
Petitioner,

v.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,
Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR CERTIORARI

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MAY IT PLEASE THE COURT:

Much of what the respondents have said is irrelevant to whether the legal questions presented are of sufficient consequence to warrant review by this Court. We conceive that to be the only issue. We shall, therefore, resist the temptation to answer the many erroneous statements of fact and law contained in respondents' brief and shall confine this

reply to so much of the respondents' brief as controverts the reasons for granting certiorari.[1]

I.

The conflict of the decision below with that of this Court in Cone v. West Virginia Pulp & Paper Co. and the importance of making clear that Rule 50(b) applies to directed verdict cases combine to require that certiorari be granted.

The Circuit Court of Appeals and the respondents have taken the position that Rule 50(b) is without application where the trial court has directed a verdict for the other party. This conclusion is rested upon the view, first, that the history, language and purpose of Rule 50(b) preclude its application in such cases, and second, that in directing a verdict, the trial court was exercising its judgment only with respect to a question of law and that the Circuit Court of Appeals was thereby authorized to reverse and finally terminate the litigation. To drive home this last argument, respondents devote a considerable portion of their brief to attempting to demonstrate that there is no question for the jury present in this case, and at page 14 erroneously distinguish the *Cone* case by asserting that there "the facts were controverted and still required a trial by jury."

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[1] Perhaps the most blatant misstatement is that appearing on page 5 and frequently throughout respondents' brief that:

> "In the instant suit, as amplified later, it will be seen that only questions of law were involved, that all of the facts were undisputed and the petitioner's proof was fully developed, and that there was no question of any missing element of proof or missing witnesses in behalf of the petitioner."

In their motion for a new trial, respondents advised the trial court that there were at least five "contested questions of fact" presented by the evidence of both the plaintiff and defendants (R. 205-206). The Circuit Court of Appeals denied rehearing expressly upon the ground that an essential element of petitioner's proof had not been made a part of the record (R. 258).

Both the Circuit Court of Appeals and the respondents misread the *Cone* case. In that case, this Court assumed that the Circuit Court of Appeals was correct in determining that there were no questions of fact for the jury and that only questions of law were present, but held, nevertheless, that the Circuit Court of Appeals was without power to direct the entry of final judgment in the absence of an appropriate post-verdict motion under Rule 50(b). 330 U. S. at 215. Thus, there is no distinction between the *Cone* case in the posture in which it was considered by this Court and this case as viewed by the Circuit Court of Appeals and the respondents.

The history and language of the Rule would have to be clear indeed to warrant excluding from its application denials of motions for a directed verdict merely because a verdict had been directed for the other party. There is no rational basis for such a distinction. This Court, in the *Cone* case, made clear that it was the purpose of Rule 50(b) to provide a litigant with the benefit of the trial court's judgment as to whether the proceedings should be finally terminated or a new trial or nonsuit granted. We are wholly unable to see why the plaintiff here, merely because it had a verdict directed in its favor, is less entitled to that benefit than a litigant who has received a verdict as the independent act of the jury, or who has received no verdict at all due to the failure of the jury to agree.

The opinion in the *Cone* case could have been written with the facts of this case in mind. The Circuit Court of Appeals reversed and finally terminated the litigation by directing that judgment be entered for the defendants upon the ground that the plaintiff had alleged an express warranty but had failed to prove it. The Circuit Court of Appeals then denied rehearing upon the ground that evidence establishing an implied warranty was not a part of

the record.[2] Even assuming the Circuit Court of Appeals to have been correct in its view of the record, the *Cone* case compels the conclusion that it was for the District Court and not for the Circuit Court of Appeals to determine what further proceedings should follow. In that case, this Court said (330 U. S. at 217):

> "There are other practical reasons why a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has had an unqualified right, upon payments of costs, to take a nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit."
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> "In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss. If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion." (footnote omitted)

It is inconceivable that the court would not have permitted the plaintiff to remedy the alleged deficiency in the proof if it had been brought to the court's attention at the

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[2] The evidence which the Circuit Court of Appeals refused to consider was in fact admitted into evidence and a part of the record, as the petition for certiorari shows and as respondents now concede (Pet. pp. 17-19; Resp. Br. p. 25).

trial stage of the proceedings, particularly since the allegedly missing proof was available and at hand.[3]

Nor is it permissible to say, as do the respondents, that, a verdict having been directed against them, it would be a meaningless ritual for them to move for judgment in accordance with their motion for directed verdict (Resp. Br. p. 41). It is undoubtedly true that denying the defendants' motion for an instructed verdict and directing a verdict for the plaintiff discloses a greater degree of conviction on the part of the trial court than denying the defendants' motion for an instructed verdict and submitting the issue to the jury for its independent judgment. It by no means follows that the trial court should thereby be conclusively presumed to be unwilling to correct his error if provided with the "opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone." (330 U. S. at 216)

For the reasons stated, the purpose of Rule 50(b) as announced in the *Cone* case applies with equal force whether the verdict was returned at the direction of the court, as the jury's independent action, or not at all. The Circuit Court of Appeals and the respondents, however, stress the Rule's purpose of avoiding the constitutional

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[3] The respondents made no appropriate post-verdict motion for judgment under Rule 50(b) and hence, the trial court had no opportunity to exercise his discretionary power of determining whether to enter judgment for the respondents upon their earlier motion for a directed verdict, grant petitioner a new trial or permit it to take a non-suit. At pages 40 and 41, respondents assert that their motion for a new trial "permitted the trial court to exercise its discretion and to choose between the alternative of either ordering a new trial or entering judgment for them on their prior reserved motion for a directed verdict." Quite apart from the novel view of the function of a motion for a new trial, the statement is absurd on its face. The discretion exercised by a trial court in considering *defendants'* motion for a new trial is wholly unlike the discretion protected by the *Cone* case and exercised by the trial court in considering whether a new trial should be ordered for the *plaintiff* after becoming convinced that it had erred in not granting the *defendants'* motion for a directed verdict.

difficulties of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913). They state, either directly or by necessary implication, that these constitutional difficulties arose only where the issues were submitted without reservation to the jury for its independent action. Hence, they argue, the entire Rule was intended to deal only with this last situation and not with a directed verdict case. Neither the Circuit Court of Appeals nor the respondents cite any authority for this view.

This view is historically inaccurate. In order for the trial court or for a Circuit Court of Appeals to enter judgment for a litigant notwithstanding a verdict because of the insufficiency of the evidence, it was essential that the question of law be expressly reserved, whether the verdict was returned as the independent action of the jury or at the direction of the court. In the absence of such a reservation, the only remedy in either such case was a new trial. In *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913), the Court held it to be a reexamination of the facts contrary to the Seventh Amendment for the Circuit Court of Appeals to direct the entry of judgment notwithstanding the verdict where the issues had been submitted to the jury without reservation of the legal question raised by the motion for a directed verdict. In the course of its opinion, the Court made clear that insofar as the constitutional objections were concerned there was no difference between a case in which the verdict was returned by the jury as its independent act and a case in which the verdict was returned at the direction of the court. In neither of such cases could judgment be ordered for the other party. A new trial was required. The Court said (at 395):

> "Equally pronounced is the difference between a demurrer to the evidence and a request for a directed verdict; for if on such a demurrer, properly joined in

and allowed, judgment is not given for the demurrant, it is necessarily given for his opponent, while if a request for a directed verdict is denied the party making the request may yet receive the jury's verdict and a judgment thereon. And when a judgment on a demurrer to the evidence is reversed because given for the wrong party, the error is corrected by ordering a judgment for the other party, *whereas when a judgment is reversed for error in granting or refusing a request to direct a verdict, judgment is not ordered for either party, but a new trial is awarded. This was so at common law, and it has been the uniform course of action in this court from the beginning.*" (Italics supplied)

A contemporary commentator also saw the *Slocum* case as applying equally to directed verdicts. *Schofield, New Trials and the Seventh Amendment*, 8 Ill. L. Rev., 287, 288-289 (1913).

In *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654 (1935), this Court approved the final disposition of the proceedings by a Circuit Court of Appeals where the legal questions raised by the motion for a directed verdict had been expressly reserved by the trial court, pointing out that this procedure was well-established at common law (at 659). The practice of reserving the legal questions in order to permit the final disposition of the proceedings without a new trial was not only followed in independent verdict cases, but also in directed verdict cases. Indeed, in the *Redman* case the Court relied upon directed verdict and nonsuit cases to illustrate the very practice that it was approving. 295 U. S. at 659-660, fn. 5. See also *Baylis* v. *Travelers Insurance Co.*, 113 U. S. 316 (1885).

It is agreed that the first sentence of Rule 50(b) was intended to obviate the constitutional objections announced in the *Slocum* case by making automatic the reservation

procedure approved in the *Redman* case. As we have shown, the same constitutional objections were raised by the *Slocum* case with respect to directed verdict cases, and the reservation procedure approved in the *Redman* case had theretofore been required to be followed in directed verdict cases as well unless a new trial were to be the only remedy. It follows that the first sentence of Rule 50(b) applies not only in those cases where the verdict was returned independently, but also in those cases where the verdict was directed. To conclude to the contrary would be to say that the Rule settled only half of the constitutional questions raised by *Slocum*. Moreover, this conclusion is fortified by the broad sweep of the language of the first sentence of Rule 50(b):

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted . . ."

The language is unqualified and applies to any case in which a motion for a directed verdict has been denied or for any reason not granted. It is of no importance in bringing the rule into play that the other party's motion may have been granted.

Even were respondents correct, however, in their view that Rule 50(b) automatically reserves the legal questions raised by a motion for a directed verdict only in those cases in which the issues are submitted to the jury for its independent action, it does not follow that the requirements of the balance of the Rule with respect to appropriate post-verdict motions have no applicability to directed verdict cases. Rule 50(b) has more than one purpose. As was pointed out in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250 (1940):

> "Rule 50(b) merely renders unnecessary a request for reservation of the question of law . . a formal res-

ervation; and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct."

The *Cone* case elaborated upon this second purpose of the Rule.

If, as the Circuit Court of Appeals held and respondents contend, Rule 50(b) is without application where the plaintiff's motion for a directed verdict was granted and the defendant's motion denied, the result is ludicrous. The defendants either would have no means of obtaining judgment despite error in directing the verdict for the plaintiff, or the time and manner of moving for judgment in this one class of cases would be unregulated by the Federal Rules. The possibility of any such anomalous result has never been suggested either by the Advisory Committee or any of the commentators upon the Federal Rules. Moreover, the requirement of Rule 50(b) that a motion for judgment in accordance with a prior motion for a directed verdict must be made before a Circuit Court of Appeals has authority to do what was done here applies in terms to the defendants. The motion must be made within ten days after the reception of a verdict, or the discharge of a jury if no verdict is returned. Here, there is no question but that a verdict was both returned and received (R. 203-204).

As a matter of fact, by virtue of the failure of the defendants to move for judgment, the Circuit Court of Appeals was required to adopt the novel and unpermissible procedure of directing the trial court to grant the defendants' motion for a directed verdict despite the fact that the jury had been discharged. The respondents defend this upon the grounds that the rendition of a directed verdict by a federal jury is a mere formality and that, in any event, the trial court could impanel a jury for the purpose of

rendering a verdict. (Resp. Br. 17-19) Both suggestions have long since been repudiated by this Court, as has been the procedure followed by the Circuit Court of Appeals.[4]

Certiorari should be granted to resolve the conflict with the *Cone* case, to establish that Rule 50(b) does regulate the time and manner of making motions for judgment even in cases where the other party's motion for a directed verdict has been granted, and to review the novel procedure employed by the Circuit Court of Appeals of directing a District Court to direct a verdict after the jury has been discharged. As the decisions referred to herein disclose, this Court has regularly granted certiorari to review the action of the Circuit Courts of Appeals in finally terminating litigation in jury cases.

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[4] This Court has consistently held that the participation of a jury is essential even in a directed verdict case. In *Barney* v. *Schmeider*, 9 Wall. 248 (1869) this Court held that even though it might have been appropriate to have instructed a verdict for the plaintiff due to the insufficiency of the evidence, it was error so to do without first submitting the evidence to the jury. The trial court had reached his decision from a reading of the evidence himself without having it read to the jury. This disposes of respondents' suggestion that it would be permissible simply to impanel a jury for the purpose of returning a directed verdict. In *Hodges* v. *Easton*, 106 U. S. 408, 412 (1882), referred to in the petition for certiorari, the Court stated that even though a directed verdict would have been permissible, it would still have been necessary for the jury to make its verdict, albeit in conformity with the order of the court. This disposes of the procedure adopted by the Circuit Court of Appeals here.

Respondents cite an Illinois case. To dispose of it, it is sufficient to refer to *Schofield, New Trials and the Seventh Amendment*, 8 Ill. L. Rev., 286, 290 (1913) where the author said "trial by jury in common-law cases according to the rules of the common law of the Seventh Amendment does not exist in Illinois, and probably does not exist anywhere in the United States, except in the federal courts."

II.

The instruction to the District Court to grant the defendants' motion for a directed verdict was based upon grounds not specified in defendants' motion. This presents an important federal question as to the proper interpretation of Rule 50 of the Federal Rules, which has not been, but should be, decided by this Court, and in addition, decides a constitutional question in a way probably in conflict with applicable decisions of this Court.

In the petition for certiorari, we pointed out that the Circuit Court of Appeals had rested its decision upon grounds not specified in defendants' motion for an instructed verdict contrary to the requirements of Rule 50; that this decision was in conflict with the decisions of other Circuit Courts of Appeals; and that, in addition, by directing the entry of judgment upon grounds not raised by the motion for a directed verdict, and hence, not automatically reserved for later determination under Rule 50(b), the decision was in conflict with those of this Court in *Sloeum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913), and *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 (1937).

Although conceding that such grounds were not specified in their motion for an instructed verdict, the respondents urge that that motion should be read in the light of their having brought these grounds to the attention of the trial court at earlier stages of the proceedings. It is unnecessary to consider whether a motion for an instructed verdict should be so read since at no time were the grounds upon which the Circuit Court of Appeals disposed of this case ever brought to the attention of the trial court. Each of respondents' record citations (Resp. Br. pp. 26-29) may be examined in vain for any contention on the part of the respondents before the trial court that the plaintiff had alleged and failed to prove an express warranty (the ground upon which the Circuit Court of Appeals rested its reversal

and direction that judgment be entered), or that there was a failure of proof on the part of the plaintiff of an essential element of an implied warranty (the ground upon which the Circuit Court of Appeals denied the petition for rehearing).

The case was tried below upon the plaintiff's assertion that the defendants had acted as principals in the transaction or as agents of an undisclosed principal, and hence were liable as principals under the Illinois law (R. 2-5, 53, 121, 131-132), while the defendants asserted that they had acted as agents of a disclosed principal or that they had been orally exonerated from liability as agents (R. 12-14, 59, 202, 205-6). Throughout, it was assumed by both parties and the court that a warranty existed and that the primary question was whether the liability was that of the defendants or of the shipper in Mexico. Indeed, the respondents' motion for an instructed verdict assumes the existence of a warranty and asserts merely that the adulteration had not been sufficient to authorize the plaintiff to reject the entire shipment (R. 202).

Also, their motion for a new trial asserted that "contested questions of fact were presented by the evidence of both the plaintiff and the defendants" with respect to the questions of agency and sufficiency of the breach. (R. 205-206)

The portions of the record referred to by respondents (Resp. Br. pp. 26-29) show merely that the respondents asserted that they were acting as agents or brokers, and accordingly, that the liability and responsibility for the shipment were those of the Mexican shipper. There is a substantial difference between asserting that one is not liable as an agent and asserting that there is no warranty. Under the first, at least the principal would remain liable.

Under the second, the buyer would have no recourse against anyone.

Respondents' brief freely uses the term "disclaimer of warranty". The record and the arguments before the trial court may be searched in vain for the use of any such term. As we have said, respondents were seeking simply to exonerate themselves as agents. But even if the record were now read as though the defendants had raised the issue of disclaimer of implied warranty in the trial court, such a reading can provide them with no comfort. There is again a substantial difference between asserting that an implied warranty has been disclaimed and asserting that the essentials creating an implied warranty do not exist. *Cf.* Section 15(2) of the Illinois (Uniform) Sales Act with Section 71 of that Act. (Ill. Rev. Stats. c. 121½ §§ 15(2), 71). The Circuit Court of Appeals rested its denial of rehearing upon this last ground (R. 258).

Resting as it does upon grounds not specified in the motion for an instructed verdict, the order of the Circuit Court of Appeals that verdict be directed and judgment entered for the defendants, conflicts both with Rule 50 and with the decisions of the other Circuit Courts of Appeals that have considered the question. *Virginia-Carolina Tie & Wood Co.* v. *Dunbar,* 106 F. (2d) 383 (C.C.A. 4th, 1939); *Atlantic Greyhound Corporation* v. *McDonald,* 125 F. (2d) 849 (C.C.A. 4th, 1942); *Ryan Distributing Corp.* v. *Caley,* 147 F. (2d) 138 (C.C.A. 3rd, 1945) *cert. den.* 325 U. S. 859 (1945).

In addition, the grounds of decision not having been raised by the motion for an instructed verdict, and hence, not automatically reserved for later determination under Rule 50(b), the action of the Circuit Court of Appeals in directing the entry of judgment for the defendants deprived

the plaintiff of the right to a trial by jury under the Seventh Amendment. *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913); *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 (1937) and discussion *supra*, pp. 5-8.

III.

The refusal by the Circuit Court of Appeals to consider testimony admitted in evidence and a part of the record on appeal constitutes such a clear departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision to prevent a gross miscarriage of justice.

The Circuit Court of Appeals rested its opinion denying rehearing upon its conclusion that evidence relied upon by the plaintiff as proving the second and last essential element of an implied warranty had not been introduced into the record (R. 258). The Circuit Court of Appeals did not question the efficacy of such proof but stated merely that "the trouble with this evidence is that it is not in the record and was kept out on the objection of the plaintiff. No part of the deposition was ever read or considered as read in evidence" (R. 258). The petition for certiorari (pp. 17-21) showed conclusively that the proof had been admitted into evidence and that the Circuit Court of Appeals had fallen into error in refusing to consider it. Respondents expressly concede that the proof which the Circuit Court of Appeals refused to consider was in fact introduced into evidence. They also concede that the Circuit Court of Appeals was mistaken in stating that the entire deposition of Todes was excluded by the trial court. (Resp. Br. pp. 23, 25)

It is impossible to read the opinion of the Circuit Court of Appeals in denying rehearing without concluding that had the Circuit Court of Appeals considered that evidence, it would have reached a different result. Its refusal to con-

sider such evidence constituted a clear departure from the accepted and usual course of judicial proceedings, which worked a gross injustice to petitioner, particularly in view of the denial to petitioner of a new trial and the direction that a final judgment be entered in favor of the respondents.

Conclusion

For the reasons heretofore given, a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be allowed.

Respectfully submitted.

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